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NO. 481

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

TUG R. A. TURRENTINE, HER ENGINES, ETC., AND BROWN & ROOT, INC., *Petitioner*

-versus-

AMERICAN HOME ASSURANCE COMPANY, ET AL., *Respondents*

PETITION FOR REHEARING

Of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner

Alpha Law Brief Co., 402 M & M Bldg., Houston 2

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To The Honorable The Chief Justice and Associate Justices of The Supreme Court of the United States:

Brown & Root, Inc., petitioner herein, respectfully petitions this Honorable Court for a rehearing herein of the order of this Honorable Court entered herein on December 5, 1960, denying its petition for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, and for grounds therefor would respectfully show:

1.

Respondents have acknowledged, by urging that the decisions of the Circuit Courts of Appeal overruled by the decision of this Court in the leading case of *Sacramento Steam Navigation Co. v. Salz*, 273 U.S. 326, 47 S. Ct. 368, 71 L. Ed. 663, namely the cases of *The Murrell*, 200 F. 826, and *The Coastwise*, 233 F. 1, are cases of analogous circumstances where the towing tug was held liable to the cargo owner for cargo carried aboard the towed barge, that the decision of the Court of Appeals herein is directly in conflict with the decision of this Court in the *Salz* case, and of the Court of Appeals for the Second Circuit in the case of *In re O'Donnell*, 2 Cir., 1928, 26 F. 2d 334, at 336.

2.

In addition to the doubts of the correctness of the decision of the Court below in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 5th Cir., 1957, 244 F. 2d 263, cert. den., 355 U.S. 871, 78 S. Ct. 121, 2 L. Ed. 2d 76, leave to file petition for extraordinary relief denied, 256 F. 2d 344, (upon which decision the Court of Appeals based its decision against petitioner) expressed in the concurring opinion by Judge Tuttle herein, other judges of the Court of Appeals have now expressed grave doubts of the correctness of the decision in the *James* case, namely the Court of Appeals speaking through Jud[illegible] Brown in the case of *Pershing Auto Rentals, Inc. v. Gaffney*, 5th Cir., June 15, 1960, 279 F. 2d 546, 547, in referring to the decision in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 5th Cir., 1958, 253 F. 2d 922, at pp. 924-925, 1958 A.M.C. 1534, 1536, 1959, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, 1959 A.M.C. 1631;

5th Cir., 1960, 274 F. 2d 36. It therefore now appears that several judges of the Court of Appeals doubt the correctness of the rule of decision of that Court in the *James* case, and petitioner respectfully submits rightly so, and that this Honorable Court should now on rehearing set the matter at rest by granting certiorari herein.

3.

The procedural objections to the granting of the writ made by respondents are without merit, having been correctly overruled by the Court below, which found that petitioner would have been entitled to the defenses of the Harter Act (embodied by reference in the bill of lading issued here) but for the Court's rule of decision in the *James* case, that the relationship here was one of towage and not affreightment so that the towing tug was denied the defenses accorded the carrier by the affreightment contract.

Statement and Argument

Respondents have correctly stated in their reply to the petition that there are two contracts here: one the oral one between the carrier and the towing tug by which petitioner contracted to tow the carrier's barge upon which the carrier later loaded the cargo for damages to which this suit was brought, and the other the printed and typed contract between the cargo owner and the carrier set forth in the short-form bill of lading by the terms of which the carrier agreed to transport the cargo and the cargo owner (whose own printed form of bill of lading was used) agreed that it would accord the carrier the defenses embodied in the Uniform Domestic Straight Bill

of Lading, among which were the Harter Act defenses relied on by petitioner and denied it by the Court below.

To the first agreement, between the carrier and the petitioner, the tugboat owner and operator, the cargo owner was *not* a party. There was *no agreement* by the petitioner with the cargo owner *to transport cargo;* its only agreement was with the carrier, and this agreement was to tow the barge. Yet the Court below has held petitioner liable to the cargo owner just as though it were the carrier and just as though petitioner were a party to the affreightment agreement and was the carrier—and yet it has denied petitioner the carrier's defenses! It has accorded the *cargo owner* the rights of the *carrier*, vis-a-vis the tugboat.

The second agreement, in short bill of lading form, was that written contract by which the carrier agreed to transport the cargo, by water. In this agreement no mention was made of petitioner or its towing tug, though of course since the bill of lading did state the cargo was to be transported by barge and from one port to another there can be no doubt (and petitioner does not controvert the fact) that the agreement was one of affreightment by water and that the carrier impliedly agreed and was therefore obligated to employ motive power (here petitioner's tugboat) to perform its contract of carriage.

Petitioner respectfully submits that the respondents in their brief herein in opposition to the petition for writ of certiorari have formally and completely acknowledged petitioner's right to grant of the writ, and have confessed the error of the Court of Appeals herein, by urging that the circumstances of the instant case are analogous to the facts of the cases overruled by this Court in its decision

in *Sacramento Steam Navigation Co. v. Salz*, 273 U.S. 326, and that they have thus also acknowledged the Court of Appeals' decision is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re O'Donnell*, 2 Cir., 1928, 26 F. 2d 334, at 336.

The statement of respondents discussing the *Salz* case in their opposing brief is as follows: (pp. 12 and 13)

> ". . . The Court approved, however, holdings of other courts that where there is a distinct and separate ownership and a contract between tug to perform towing services, the Harter Act was not available. In the *Sacramento* case the court said in part:
>
> "'Respondent contends that his view to the contrary is sustained by *The Murrell*, D.C. 200 Fed. 826 affirming (C.C.A. 1st) 195 Fed. 483, and The Coastwise, 147 C.C.A. 71, 233 Fed. 1, affirming (D.C.) 230 Fed. 505. Some things are said in those cases which, if we should not consider the differences between them and the present case, might justify this contention. The most important of the differences is that in both cases it was held that contracts of towage and not of affreightment were involved. We do not stop to inquire whether this conclusion as to the nature of the contracts was justified by the facts. It is enough that it was so held and this holding was the basis of the decision. Here, upon all the facts as we have just said, the contract upon which Respondent must rest is one of affreightment, the obligation of which is to carry a cargo, not to tow a vessel.'
>
> "There can, then, be a contract to tow 'separated' as petitioner says, from a contract of affreightment by even a common carrier and that contract of towage can create a liability to the cargo owner by the tow by negligent towage of the barge."

Please contrast respondents' view of these decisions with that of the Circuit Court of Appeals for the Second Circuit: Judge Learned Hand's opinion in *In re O'Donnell*, 126 F. 2d 334, at 336, makes it perfectly clear that the two cases referred to by respondents as persuasive authority in analogous circumstances to the facts of the instant case were overruled by the *Salz* case and also held to be no longer authoritative by the Circuit Court of Appeals for the Second Circuit. The Court said (at p. 336):

> "Sacramento Nav. Co. v. Salz, if not a departure from the earlier doctrine, at least settled the law against some earlier decisions. In spite of the guarded language used, it is impossible to suppose that it did not overrule The Murrell (Baltimore & Boston Barge Co. v. Eastern Coal Co.) 195 F. 483 (C.C.A. 1), and The Coastwise, 233 F. 1 (C.C.A. 1). It is true that the opinion formally left these untouched, but only on the theory that the contracts had there been held to be for towage. Since both vessels were owned by a single owner, the decisions certainly can no longer stand on their facts, and were not meant to be approved, as we understand it. . . ."

There can therefore be no doubt that respondents have acknowledged, and quite correctly so, that the decisions of the Court below in this instant case and in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, are in direct conflict with the decision of this Court in *Sacramento Steam Navigation Co. v. Salz*, and the decision of the Court of Appeals for the Second Circuit in *In re O'Donnell*.

Several Judges of the Court Below Doubt the Correctness of Its Decision in the James Case

As petitioner has pointed out in its original petition and supporting brief, the Court below held against petitioner

on the ground that while petitioner would have been entitled to judgment under the Harter Act defenses embodied in the contract for carrying the cargo had it been the carrier, that its decision in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 5th Cir., 1957, 244 F. 2d 263, cert. den., 355 U.S. 871, 78 S. Ct. 121, 2 L. Ed. 2d 76, established petitioner was *not* the carrier and was only engaged to tow the barge and hence could not urge to the claims against it made by the cargo owner any defenses accorded by the bill of lading, to which it was not a party.

The *James* case is of course actually not yet finally decided, and hence should not properly have been relied upon by the Court of Appeals. Please see the per curiam opinion, *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 5th Cir., 1958, 256 F. 2d 344, where the Court expressly held on application by the losing party for extraordinary relief (urging the obvious conflict in result between the *James* case and *River Terminals Corp. v. Southwestern Sugar & Molasses Co.*, 253 F. 2d 922), that its decision would hereafter be re-examined in connection with an appeal from the final decree (the *James* decision, 244 F. 2d 263, being made upon an appeal from an interlocutory decree in admiralty).

Since the original petition herein was filed, it has come to the attention of petitioner that yet other judges of the Court below greatly doubt the correctness of the rule of decision in the *James* case. As pointed out in the original petition, in the instant case in his concurring opinion Judge Tuttle expressly states his doubt of the correctness of the *James* case, as well he might in view of the decision in which he spoke for the Court in *River Terminals Corp.*

v. Southwestern Sugar & Molasses Co., 5th Cir., 1958, 253 F. 2d 922, where it is expressly stated that the decision of the *James* case is of doubtful authority.

Now Circuit Judge Brown, learned in admiralty, in referring to those references to the *James* decision made in the *River Terminals Corp. v. Southwestern Sugar & Molasses Co.* decision, expresses his (and presumptively also those of the two other judges then sitting, though Judge Hutcheson was a member of the Court also in the instant case) doubts of the correctness of the *James* decision. In *Pershing Auto Rentals, Inc. v. Gaffney*, 5th Cir., June 15, 1960, 279 F. 2d 546, 547, he refers to Judge Tuttle's opinion in the *River Terminals* case where the *James* case is dealt with in these words:

> "... We do not have to decide whether this is an occasion for the exercise of our undoubted right and duty to reexamine a former decision when its correctness has been brought sharply into question. River Terminals Corp. v. Southwestern Sugar & Molasses Co., 5 Cir., 1958, 253 F. 2d 922 at pages 924-925, 1958 A.M.C. 1534, 1536, 1959, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, 1959 A.M.C. 1631; 5 Cir., 1960, 274 F. 2d 36 ..."

Petitioner therefore respectfully submits that it now appears that several of the judges of the Court of Appeals for the Fifth Circuit plainly consider that the Court's decision in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 244 F. 2d 236, relied on by the Court below as controlling here, is probably erroneous. While the parties to that case can still have their rights adjudicated on appeal from the final decree and the incorrect decision set aside

as to them, no such recourse is in usual course open to the petitioner herein, who can obtain relief from the effect upon the decision of this case of the erroneous decision of the *Mississippi Valley Barge Line Co. v. T. L. James & Co.* only here.

The Procedural Objections Raised by Respondents Are Completely Without Merit

First of all of course the Court below paid no heed to these contentions, which were there raised, and therefore must be considered overruled. As its decision plainly shows, the Court below affirmed the trial court's decision that the carrier's vessels (of course including petitioner's tug) were seaworthy and expressly stated that were the case not ruled in its view by its decision in the *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, the petitioner would have been accorded the Harter Act defenses embodied by reference in the bill of lading and found not liable.

Furthermore, the contentions themselves have no merit, in the pleadings, facts proved, or law.

Petitioner expressly pleaded that it was engaged only to tow the barge and that it performed its contract properly and delivered the barge to its destination, and that while it had no liability to cargo, had the carrier not improperly loaded the cargo on the barge it would have likewise safely towed and delivered the cargo on the barge to its destination. It urged the liability of the carrier for improperly loading the barge. Alternatively, it urged that if it be held to the obligations of the carrier to the cargo owner, and if it be held that the cargo owner could claim directly

against petitioner's towing tug, that it was entitled to the defenses to which the carrier was entitled under the Harter Act. The pre-trial stipulation of the parties (hardly needed in this admiralty cause) expressly stated that one of the points at issue was whether the relationship of the parties here was one of *towage*, (or, in other words, whether on the other hand it was one of affreightment). That the trial court had before it all these contentions appears plainly from its decision.

Even if the pleadings were defective, which plainly was not so, since the issues were all tried no later objection can be made to the pleadings. Please see *Val Marine Corp. v. Costas*, 2 Cir., 1959, 256 F. 2d 911, at 915, 1959 A.M.C. 108, 114, where the Court said:

> " . . . But in any event, under F.R. 15(b), a practice well known in admiralty,[6] when issues not raised by the pleadings are tried by express or implied consent of the parties, they are to be treated in all respects as if raised in the pleadings. See also F.R. 54(c), applying a similar rule with respect to matters not expressly covered by the prayer for relief. Thus if a further formal pleading be deemed necessary, the application of this principle thoroughly fills the gap. . . ."

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[6] Fyfe v. Pan-Atlantic S.C. Corp., 2 Cir., 1940 A.M.C. 1037, 111 F. 2d 72, 78, certiorari denied Pan-Atlantic S. S. Corp. v. Fyfe, 311 U.S. 711, 1940 A.M.C. 1672; Menefee v. W. R. Chamberlin Co., 9 Cir. 1950 A.M.C. 1325, 183 F. 2d 720; The Roslyn, 2 Cir., 1937 A.M.C. 1575, 93 F. 2d 278; The Minnetonka, 2 Cir., 146 Fed. 509 certiorari denied 203 U.S. 589; 2 Benedict on Admiralty 559 (6th Ed. 1940). See also Gulf Smokeless Coal Co. v. Sutton, Steele & Steele, 4 Cir., 35 F. 2d 433, 439, rehearing denied 36 F. 2d 224, certiorari denied 280 U.S. 609.

Conclusion

It is therefore manifest that respondents have now formally acknowledged and confessed what is quite plain and obvious, that the Court below has departed from the decision of this Honorable Court in *Sacramento Steam Navigation Co. v. Salz* and has returned to the erroneous decisions overruled in that decision, and that its decisions in the instant case and in *Mississippi Valley Barge Line Co. v. T. L. James & Co.* are directly in conflict also with the decision of the Court of Appeals for the Second Circuit in *In re O'Donnell* (as well as with the other decisions, including its own, referred to in petitioner's original petition herein); and that these decisions are probably erroneous is now recognized by several judges of the Court below.

Within the jurisdiction of the Court of Appeals for the Fifth Circuit are great inland waterways upon which move very many cargoes transported aboard barges towed by tugboats constituting a large part of the country's domestic commerce. Of course in such water-borne commerce towage of the carrier's cargo-laden barge by the carrier's tugboat is only a part, though an integral part, of the carriage of the cargo agreed by the carrier to be performed for the shipper. Whether the tugboat is operated by the carrier or rented by the carrier is properly no concern of the shipper, as the decision of this Court in *Sacramento Steam Navigation Co. v. Salz* establishes. To let the shipper take the place of the carrier and to sue the tug for improper towage, as here the Courts below have done, and thus to avoid the contract of cargo carriage, is to confuse the relationships of the parties to the transportation of the cargoes contrary to established legal principles and to upset the

law governing transportation by water upon the country's great inland waterway system.

For these reasons, set forth above, petitioner respectfully prays that this motion for rehearing be granted, and that its petition for issuance of writ of certiorari be granted, and that upon hearing the judgment of the Court of Appeals be reversed.

Respectfully submitted,

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner
Brown & Root, Inc.

Certificate (Rule 58)

I certify that the within petition for rehearing of the order of the Honorable the Supreme Court of the United States denying the petition for writ of certiorari to issue to the Honorable the Court of Appeals for the Fifth Circuit entered December 5, 1960, is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of the Supreme Court Rules, namely intervening circumstances of substantial effect or other substantial grounds available to petitioner and not previously presented.

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner

Certificate of Service

I certify that copies of the foregoing petition for rehearing have been served upon opposing counsel of record, Edmond J. Ford, Jr., properly addressed to him at his office at 1517 Wilson Tower, Corpus Christi, Texas, in the United States mail with adequate postage affixed thereto.

ROBERT EIKEL